No. 13,286

IN THE

United States Court of Appeals
For the Ninth Circuit

HASTORF-NETTLES, INC., a corporation, and UNITED PACIFIC INSURANCE COMPANY, a corporation,
Appellants,
vs.
WARREN H. PILLSBURY, Deputy Commissioner for the Thirteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act and the Defense Bases Act and CECIL VOGEL,
Appellees.

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BRIEF FOR APPELLANTS.

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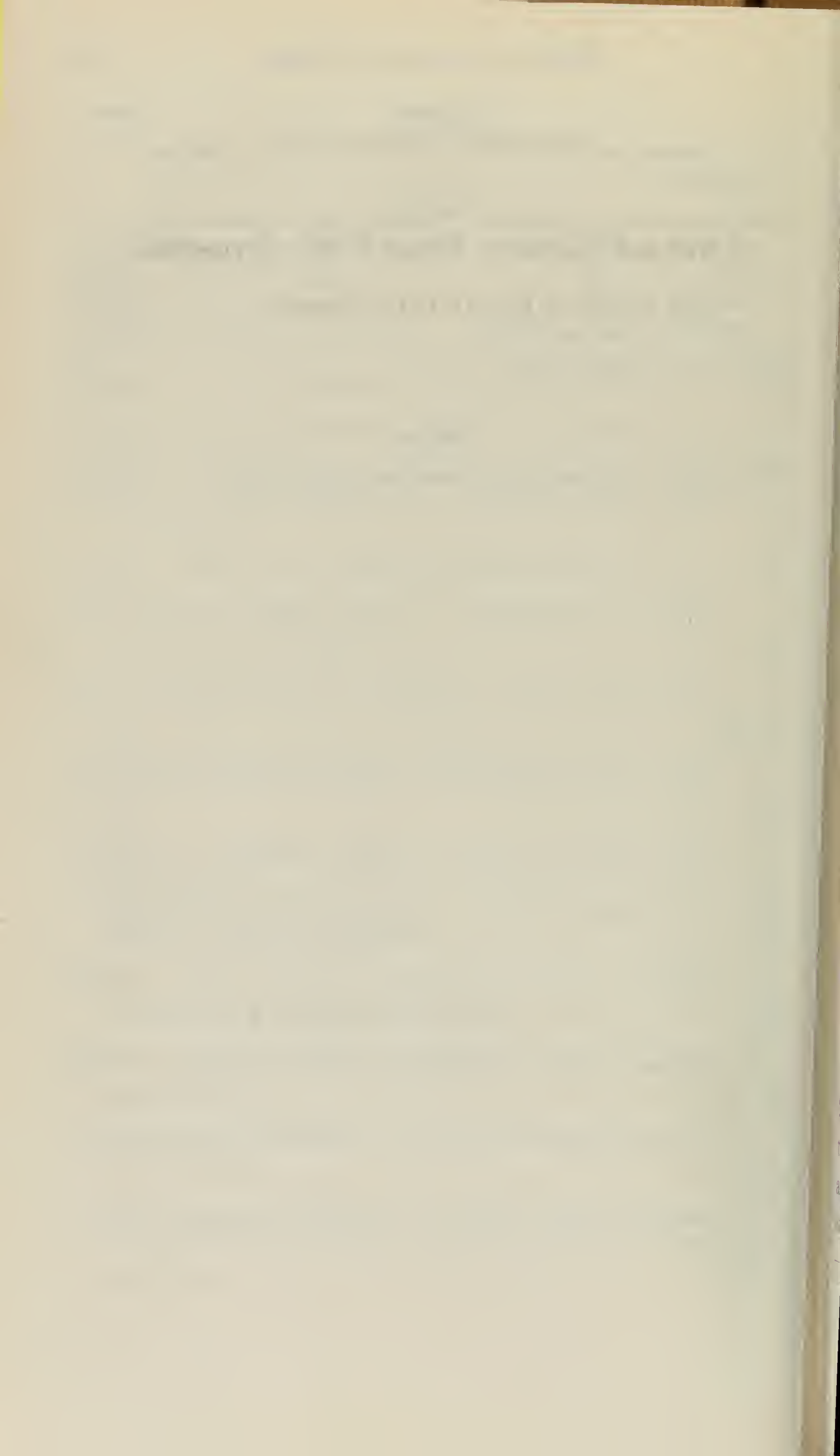

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Appellees.

BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

By complaint for injunction (Tr. 3),* filed August 29, 1951 in the District Court below, appellants sought to have that court review and set aside as not in accordance with law a compensation order in favor of Cecil Vogel made by Deputy Commissioner War-

*"Tr." refers to Transcript of Record; references are to pages.

ren H. Pillsbury on August 17, 1951. Said complaint was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Act of March 4, 1927, 44 Stat. 1424, 33 U.S.C.A. Sec. 901 et seq., as made applicable to employment at certain defense base areas and elsewhere by the Act of August 16, 1941, 55 Stat. 622, 42 U.S.C.A. Secs. 1651-1654. Jurisdiction in the District Court was based particularly on Section 921(b) of the said Longshoremen's Act.

Thereafter defendant Pillsbury filed a motion to dismiss and the cause was argued before the District Court.

On January 29, 1952 the District Court filed its order granting the said motion to dismiss, and on January 30, 1952 said court entered judgment of dismissal thereon.

On February 20, 1952 appellant filed its notice of appeal from said order and on March 14, 1952 filed a supplemental notice of appeal from the judgment of dismissal.

The jurisdiction of this court is invoked under 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE.

Cecil Vogel was employed as a steamfitter at Fort Richardson, Alaska, by the Hastorf-Nettles Company, which was a subcontractor for the Pomeroy Company; other than this subcontract, the companies were not connected (Tr. 23). While there, Vogel lived

in a labor camp located five or six miles from Anchorage (Tr. 21). Fort Richardson is a large Army base and the work being performed by the Hastorf-Nettles Company was about seven miles from the labor camp, which was also on the base.

September 4, 1950 was Labor Day and a holiday from work (Tr. 26). Upon the morning of that day, claimant Vogel and a fellow employee went to Anchorage on the regular city bus to a station of the Alaskan Railroad. It was their intention to take the train to Palmer, a small community some forty-five miles from Anchorage (Tr. 21) and to attend an exposition there. The claimant purchased a round-trip ticket at the station in Anchorage. The pair then took the train to Palmer and walked from the railroad station there to the fair grounds, which were about one quarter of a mile from town.

At about 5:30 P. M. they returned to Palmer, intending to catch the 6:30 P. M. train back to Anchorage, when they met Mr. Buhlman, who was a carpenter superintendent for the Pomeroy Company, and a personal friend of the claimant (Tr. 21, 33, 34). Buhlman had arrived at the Fair in a pick-up truck belonging to the Pomeroy Company. His trip was likewise for purposes of recreation (Tr. 41). Buhlman suggested that the two men and a lady who was in Buhlman's company should have dinner at a restaurant outside of Palmer, and that he would then give them all a ride back to the base. All four then proceeded to the restaurant, had dinner, stayed a little bit and danced (Tr. 34). They then drove down the

regular public highway between Palmer and Anchorage until in some maner the truck was driven off the road a few miles from the labor camp (Tr. 35). In this accident, the claimant received his injuries.

Claimant's employer, the Hastorf-Nettles Company, had only one pick-up truck of its own at Fort Richardson (Tr. 30) and employees of this company were usually transported between the labor camp and the place of work in Pomeroy trucks (Tr. 23, 24, 39, 40, 45). The claimant never had occasion to use Pomeroy vehicles other than in traveling back and forth between his camp and the job site (Tr. 24).

Witness Buhlman testified that he had been assigned a Ford pick-up truck by the Pomeroy Company (Tr. 42, 43). He kept this truck in his personal custody at all times, and the Pomeroy Company supplied the gasoline. Buhlman and other Pomeroy drivers sometimes gave lifts to employees of subcontractors who were returning from the mess hall to the labor camp (Tr. 46). The Pomeroy Company had an office in Anchorage, and if Buhlman happened to be driving there after working hours, and he saw a workman, he would give such a person a ride as a matter of goodwill (Tr. 42, 45). He received no direct instructions to do this (Tr. 44).

On September 4, 1950, Buhlman did not ask specific permission to take the truck to the Fair.

There were no recreational facilities at the labor camp (Tr. 25); the men who were off duty could go into Anchorage (The 1950 population of Anchorage is

estimated at 20,000). The Hastorf-Nettles Company did not supply transportation into town, nor did it give the men an allowance covering such transportation (Tr. 27, 32). There was a city bus running between the camp and Anchorage as well as a taxi service. The buses ran every half hour or hour, and claimant usually went by bus when he had occasion to go to Anchorage (Tr. 28, 29).

QUESTION PRESENTED.

The sole question presented for the determination of the court is whether or not there is substantial evidence in the record considered as a whole to justify the finding that claimant's injury arose out and in the course of his employment.

SPECIFICATION OF ERROR.

Appellant specifies as error the findings of fact of Deputy Commissioner Pillsbury (Tr. 11-13) and particularly the following:

> "1. * * * Claimant's injury arose out of and in the course of his employment with the employer herein * * *" (Tr. 12).

Appellant specifies this finding as error because it is not supported by a substantial evidence on the record considered as a whole. *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456.

SUMMARY OF ARGUMENT.

A. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-950, provides for compensation for injuries; but an award may be made only for such injuries as arise out of and in the course of the employment, 33 U.S.C. Sec. 902(2).

B. Claimant on the occasion of his injury had been enjoying a day off from work, and had gone to a distant town for purely recreational purposes. At the time he was injured, he was returning to his camp in a truck belonging to another employer than the appellant and was performing no service in connection with his employment. Under general principles of compensation law, and particularly under the "going and coming rule", it would appear that his injury did not arise out of and in the course of his employment.

C. An exception to the "going and coming rule" is recognized where the employer furnishes the transportation, in the course of which the employee is injured. An examination of the cases indicates that before the employer can be said to have "furnished the transportation" it must appear:

1. That the employer owned or controlled the means of transportation *and*

2. That the transportation furnished was contemplated by the contract of employment.

D. In the instant case, there is no evidence at all—

1. That the claimant's employer, the appellant herein, owned or controlled the transportation at the time claimant received his injuries *and*

There is no *substantial* evidence in the record considered as whole to indicate—

2. That the transportation was contemplated by the contract of employment.

Under the ruling of the Supreme Court of the United States in the recent case of *Universal Camera Corporation v. National Labor Relations Board,* 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456, Appellate Courts are required to examine the record to determine whether or not there is substantial evidence to support the findings. An examination of this record clearly indicates that claimant has not established that the injury in this case arose out of and in the course of employment.

ARGUMENT.

1. EXCEPT WHERE THE EMPLOYER FURNISHES THE TRANSPORTATION, INJURIES INCURRED WHILE THE CLAIMANT IS GOING TO OR COMING FROM WORK DO NOT ARISE OUT OF AND IN THE COURSE OF THE EMPLOYMENT.

The Longshoremen's and Harbor Workers' Compensation Act is similar to many other compensation statutes in that compensation is provided thereunder only in the case of injuries which arise out of and in the course of employment. 33 U.S.C. Sec. 902(2).

> "The term 'injury' means accidental injury or death arising out of and in the course of employment * * *"

It is a familiar rule under most compensation acts that an employee who is injured while going to or coming from work may not recover compensation, since his injury does not arise out of and in the course of his employment. In this case it is undisputed that the claimant's purpose when he accepted a ride in Palmer from Buhlman, the Pomeroy Company superintendent, was to return to the labor camp on the Fort Richardson army base after a day of personal recreation. Therefore, if his injury is compensable, it is because he qualified for compensation under some exception to the going and coming rule.

> "One well recognized exception to the general rule is that when transportation is furnished by the employer to convey a workman to and from his place of work as an incident of the employment and the means of transportation are under the control of the employer, an injury sustained during such transportation arises in the course of employment and is compensable." *Smith v. Industrial Accident Commission,* 18 Cal. (2d) 843, 118 Pac. (2d) 6.

This exception is amplified in 27 *Cal. Jur., Workmen's Compensation,* Sec. 85:

> "Thus when transportation is not furnished as a necessary incident of the employment or as a requirement imposed by the nature or the location of the work, and the use of transportation on the part of the employee is entirely voluntary

and optional and bears no relation to the contract of employment, the dangers involved are not risks of the employment and therefore an injury incurred while using such means of transportation is not compensable."

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2. **BEFORE THE EXCEPTION TO THE GOING AND COMING RULE IS APPLICABLE BOTH THE FACTORS OF CONTROL AND CONTEMPLATION BY THE CONTRACT OF EMPLOYMENT MUST APPEAR.**

An examination of the principal cases discussing the exception to the going and coming rule reveals that although they fall into different factual categories, there is no case where compensability of an injury has been sustained where there have not been present *both* the factors that the employer owned or controlled the means of transportation *and* that the transportation so furnished was contemplated by the contract of employment. A few of the principal cases will be summarized here to demonstrate this fact.

A. The commonest situation where the exception to the rule is invoked is where the employer arranges with the employee that he will be driven to and from work. Such an arrangement is often used where the employee's home is distant or inaccessible from the place of work and the employer wishes to make certain that his labor force will reach the job each day without undue delay.

Characteristic of this type of case is *Rubeo v. Arthur McMullen Company,* 117 N.J.L. 574, 189 Atl.

652; *Id.,* 118 N.J.L. 530, 193 Atl. 797. There, the employee received a daily ride with the employer's superintendent from his home in New Jersey to the job in Staten Island. The vehicle involved in the accident wherein the employee was injured was one of the employer's trucks, and the accident occurred on the homeward trip. It was held that under these circumstances the travel arrangement was one of mutual benefit and convenience and was in effect a part of the employment contract, and that the injury was hence compensable.

Likewise in *McWilliams Dredging Company v. Henderson,* 36 Fed. Supp. 361, the employee was drowned while returning on a Sunday night on a scow belonging to his employer to the dredge where he bunked. It was shown that this was the regular method of getting to and from the dredge and that the employer furnished this means of transportation to his employees.

In each of these cases, it is apparent from the facts that the employer owned or controlled the transportation and that the transportation furnished was contemplated by the employment in that it was of benefit both to the employer and to the employee.

B. Another common situation is where the employer does not actually own the transportation but either pays the employee a transportation allowance or makes some other arrangement for his carriage. In *Trussless-Roof Company v. I. A. C.,* 119 Cal. App. 91, 6 Pac. (2d) 254, the employee was receiving a ride

in a fellow employee's car when the injury occurred. It appeared that the employer had agreed to reimburse the employee who furnished such transportation. Under these circumstances, the result was the same as if the employer had furnished the car, and the Court held that he could not be heard to deny the element of control of the transportation.

Similar is the case of *Alberta Contracting Corporation v. Santomassino,* 107 N.J.L. 7, 150 Atl. 830, where the employees worked at a remote area not readily accessible by public transportation. It was their custom to ride to and from work in trucks being used on the job. The employer had long known and acquiesced in the employees' habit of using these trucks for transportation to and from work, though he had not given specific permission. It was held that under these circumstances the transportation was in effect being furnished by the employer, and the case was held compensable.

Likewise in *Cardillo v. Liberty Mutual,* 330 U.S. 469, 67 S.Ct. 801, 91 L.Ed. 1028, the employer was required to furnish transportation to its employees because of a contract between it and the union to which the particular claimant belonged. The employer chose to take care of this requirement by paying the transportation cost and allowing employees to drive their own vehicles. It was held that it could not abdicate the function of control by such means, but must be held to have continued in control, so that an injury incurred by the claimant while travelling home after work in his own automobile was compensable.

The case of *Liberty Mutual Insurance Company v. Gray,* 137 Fed. (2d) 926, likewise illustrates the holding in this type of situation. There the facts were that a construction worker was hired to work a seven day week on Oahu, T. H. He lived in a construction camp, ordinarily receiving free transportation from his employer from the camp to his place of work. On the occasion in question he took two days off and went into Honolulu for recreation, and on the morning of the third day boarded a bus to return to work. He was injured in an accident while on the return trip. It appeared that the bus was the property of an independent contractor, but had been hired by his employer exactly for the purpose for which he was using it, i.e. to return the employees from the city to the place of work. No fare was charged the employee. Under these circumstances, the Court was able to find that the employer contemplated such recreation by the employees and furnished them transportation from town to the place of work.

It should be noted particularly that the element of control of the transportation is still present in this case, as much as if the employer had itself owned the bus in which the claimant incurred his injuries. Likewise, the employer recognized the need for recreation by its employees and furnished transportation for the very purpose for which it was being used—the returning of employees from the city to the place of work.

C. Where the employee is injured in the employer's transportation, but such transportation is fur-

nished only as a courtesy and has no relation to the contract of employment, the cases are uniform in holding such injuries non-compensable.

This was the situation in *Boggess v. I. A. C.,* 176 Cal. 534, 169 Pac. 95. There the applicant, a miner, was on leave of absence and had returned part way to his place of employment when he met his superintendent, who offered to pay him for his time in helping load a truck with supplies for the mine. When the loading was completed, the superintendent offered to take the employee back to the mine instead of his taking the stage as he had planned. On the way the accident occurred. The Court held the injury not compensable stating:

> "his going to the mine on the truck instead of by stage was arranged merely as a matter of convenience to him. It was no part of his service."

To the same effect, see *Gruber v. Mercy,* 7 N.J. Misc. 241, 145 Atl. 106.

A similar decision was reached in the case of *Hama Hama Logging Company v. Department of Labor,* 288 Pac. 655, 157 Wash. 96. There the employee was injured while making a free Sunday trip from the logging camp to a nearby town for personal reasons on the employer's railroad speeder. The evidence further showed that the employer took employees to town regularly for recreation on weekends. The court in holding the case non-compensable stated:

> "Spears was not engaged in furthering the interests of his employer at the time he received his injuries. Those injuries were sustained on an

> occasion when time was his own. He was making the trip from the camp on his own time and for his own personal business or pleasure. * * * The Logging Company merely permitted or authorized its employees to ride on the speeder free of charge as a convenience to the employees and not in furtherance of its business. This is not a case wherein the employer has agreed to transport its employees to and from work daily as a part of its contract with them. Here the employee sustained an injury when he was not performing any duty that he owed to his employer."

A recent California case, *Arabian American Oil Company v. I. A. C.,* 94 Cal. App. (2d) 388, 210 Pac. (2d) 732, holds that a trip for pleasure is not made a business trip because the employee uses the employer's vehicle with permission. There the injured person was employed as a stenographer in Saudi Arabia by Aramco. While there she lived in a company town and was given board, lodging and transportation to and from work. The employer also maintained a car pool so that its employees might use its vehicles for pleasure after work. The employee in this case was injured outside of the company town while being driven by a fellow employee in one of the car pool vehicles to a beach for recreation. Under these circumstances the Court held the injury not compensable, stating:

> "Petitioner contends that the injury did not arise out of or in the course of employment and that the injury was not proximately caused by the employment. That contention is sustained * * * Miss Brown * * * at the time of the accident was

on a pleasure trip. While petitioner permitted employees after working hours to use his vehicles for pleasure it did not require them to do so. * * * The mere fact that she was riding in a vehicle owned by petitioner at the time of the accident is not sufficient to create liability under the Workmen's Compensation Act."

D. Likewise, where the element of ownership or control of the vehicle is absent, it has been held that an injury received therein is not compensable.

In *California Highway Commission v. I. A. C.*, 61 Cal. App. 284, 214 Pac. 658, the injured man worked on highway construction and lived at a camp furnished by the State. It was the custom for the workmen to return to camp from their particular location on the highway for lunch each day on trucks furnished by the employer Highway Commission. On the day of injury the applicant missed the truck bound for camp and started to walk back, but after walking a little bit, he was picked up by a fellow employee who was driving his personal vehicle. The accident occurred on the way to camp. In holding the situation not one of compensability, the court stated:

"The logic and reason of charging an employer in a case where an employee is injured while riding on an instrumentality provided by said employer is that said employer has such instrumentality under his control. He may inspect and repair it. He must see that it is driven by a competent and careful driver. It is his business to look after such conveyance just as it is his business to look after the safety of the premises where

> his employees work; but when the employer does not own or control the vehicle; does not even know that the employee will elect to use it; does not know whether it shall be driven by a reckless or careful driver or by a man who is intoxicated or by one who is sober, how can it be either logical or just to hold him responsible for injuries occurring to the employee while riding to and from his work in such a vehicle? Had applicant entered a conveyance provided by his employer to take employees to lunch, the risk attendant upon riding therein might be a risk incident to his status as an employee because only in that capacity would he enter the vehicle. But when he chose to accept an offer from a driver of a passing vehicle to take him to lunch, a matter of personal concern to himself—all possible connection with his employment was severed."

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3. IN REVIEWING THE FINDINGS OF THE DEPUTY COMMISSIONER THIS COURT MUST DETERMINE WHETHER OR NOT THERE IS SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD TO JUSTIFY THOSE FINDINGS.

In *Universal Camera Corporation v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, the Supreme Court decided that the judicial review provisions of the Administrative Procedure and Taft-Hartley Acts were identical in that the legislative history of both Acts indicated that these statutes had broadened the scope of judicial review. In reviewing administrative proceedings, the Supreme Court indicates that the Appellate Courts are not merely to search the record for *some* evidence to support a particular finding but—

> "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight * * * Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function."

It cannot be doubted that this new standard of judicial review is applicable to proceedings under the Longshoremen's and Harbor Workers' Act. *O'Leary v. Brown-Pacific-Maxon,* 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483.

The new standard established by the *Camera* case has received comment in some of the other circuits. For example, in *National Labor Relations Board v. Universal Camera, etc.* (2nd Cir.), 190 Fed. (2d) 429, on hearing after remand by the Supreme Court, Judge Learned Hand commented:

> "* * * (A)lthough the amendment of the old Act was in terms limited to adding that courts of appeal should scrutinize the whole record on reviewing findings of the Board, its implications were more extended * * * the (Supreme) Court agreed that in the case at bar we had based our review upon the whole record, but it held that the amendment had been a resultant of prolonged discussion in both houses, and although in form it did not more than incorporate what had always been the better practice—our own included—it was intended to prescribe an attitude in the courts of appeal less complaisant toward the Board's findings than had been proper before; not only were they to look to the record as a whole, but they were to be less ready to yield their personal judgment on the facts; at least less ready than many at times had been.

Presumably that does not extend to those issues on which the Board's specialized experience equips it with major premises inaccessible to the judges, but as to matters of common knowledge we ought to use a somewhat stiffer standard * * *"

In *N.L.R.B. v. Tri-State Casualty Insurance Company,* 188 Fed. 2nd 50, the Tenth Circuit commented:

"* * * Since the amendatory act did not purport to curtail the power of the Board to prevent prescribed unfair labor practices and since 'no drastic reversal of attitude was intended' by the change in terminology in Section 10-E, we perceive that the net effect of the Universal Camera Corporation case is to quicken the disposition of the Appellate Courts to vouchsafe the integrity of judicial review. In other words, our application of the substantial evidence rule should not be 'merely the judicial echo of the Board's conclusion'."

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4. AN EXAMINATION OF THE RECORD REVEALS THAT THERE IS NO EVIDENCE TO INDICATE THAT THE EMPLOYER HERE OWNED OR CONTROLLED THE TRANSPORTATION, AND NO SUBSTANTIAL EVIDENCE INDICATING THAT THE TRANSPORTATION WAS A PART OF THE CONTRACT OF EMPLOYMENT.

Armed with the new and "stiffer" standard established by the *Camera* case, we may examine the record to determine whether or not there is substantial evidence to support the Commissioner's finding that this injury arose out of and in the course of employment. This necessarily means that the Claimant

must have shown by substantial evidence that the transportation in which he was injured was owned or controlled by his employer, the Hastorf-Nettles Company, *and* that such transportation was contemplated by the contract of employment.

A. There is no evidence that the Hastorf-Nettles Company owned or controlled the means of transportation at the time of the injury.

It may be conceded that the record in this case justifies an inference that the Hastorf-Nettles Company had no transportation of its own whereby its employees might be transported between the labor camp and the job site on Fort Richardson, and that this necessary transportation was furnished by the Pomeroy Company, the general contractor. It further appears from the record that Pomeroy truck drivers frequently gave lifts to employees of other subcontractors between the mess hall and the labor camp and that at least on some occasions Pomeroy trucks had given men rides into Anchorage. The evidence shows that as to these latter acts, the Pomeroy Company had imposed no limitations on the use of trucks for this purpose, but on the other hand, had given no specific directions that they were so to be used.

There is a complete absence of evidence in the record as to whether or not the Hastorf-Nettles Company approved of any of these practices, sanctioned them, or even knew of them.

On the day in question, however, the particular Pomeroy truck involved was not being used for its

customary purposes on the army base; instead it had been taken without permission by Buhlman for purely recreational purposes to a point some forty-five miles away. Buhlman did not ask specific permission to make this trip and the attitude of his employer, the Pomeroy Company, toward it remains in doubt. Further, we are concerned here with the attitude of the Claimant's employer, the Hastorf-Nettles Company. It is at this point that the record completely fails to provide evidence from which it may be inferred that the Hastorf-Nettles Company contemplated an arrangement with the Claimant whereby he would be provided with transportation by the Pomeroy Company for purely recreational purposes. From all that appears from the record, there is nothing upon which to base even an inference that the Hastorf-Nettles Company had any control, whether indirect or direct, over the transportation in which the Claimant was injured upon the day of the accident. Thus the record lacks substantial evidence to justify the Commissioner's findings that the injury arose out of the course of the employment in this connection.

B. There is no substantial evidence that the furnishing of transportation was contemplated by the contract of employment.

The second test with which we are concerned is whether or not the transportation was furnished as a part of the contract of employment.

There is an indication in some of the cases that the scope of employment may be expanded to in-

clude certain recreational activities of employees in certain factual situations. These cases usually involve employment in an area remote from civilization where the employees live together in a company town. In such decisions, the facts indicate that the employer recognizes the need for recreation on the part of its employees and either furnishes recreational facilities in the company area or provides transportation for its employees so that they may seek recreation in areas distant from the camp and place of work. *Liberty Mutual vs. Gray,* supra. There are, however, cases to the contrary. *Arabian-American Oil Company v. I.A.C.,* supra.

In cases where transportation is furnished for recreational purposes and an injury arising out of this transportation is held compensable, we invariably find two factors present. First, that the remoteness of the area and the lack of nearby recreational facilities prompt the employer to assist its employees in seeking recreation at some distance from the place of work. Second, that because of the absence of good public transportation the employer allows the employees to use its own vehicles in their recreation.

The evidence in this case shows unequivocally that both of these factors are lacking. In the present day, Alaska can hardly be considered a remote wilderness area and our service installations there are not so far from familiar types of recreation as are those located on an island such as Okinawa. The evidence here shows that the Claimant lived in a labor camp only five or six miles from Anchorage, a

town of some 20,000 persons. It may be inferred that employees customarily sought their recreation in Anchorage, and indeed the record shows affirmatively that the Claimant was in the habit of doing so. The second familiar element is also lacking; the employer did not furnish any transportation for recreational purposes because there was not only a city bus but a taxi line connecting Anchorage and Fort Richardson. The bus line provided good service every half-hour or hour, and it was, therefore, unnecessary for any employer transportation to be furnished. Likewise, the employer did not give the employees any travel allowance.

Even if travel to and from Anchorage had been envisioned by the contract of employment though done for recreational purposes, it remains the fact that on the day in question the Claimant was on holiday and chose to go not to Anchorage but to the town of Palmer, some forty-five miles distant. This unusual act was occasioned because there was a Labor Day Fair at that town. It is again significant to note that the employee did not use his employer's transportation to reach his destination and in fact plainly had no thought of doing so throughout the trip, for he purchased a round trip ticket on the Alaskan Railroad. By pure fortuity he encountered Buhlman, a personal friend, and was offered a ride back to the camp.

As we have indicated, it must be from these facts that the Commissioner impliedly found that the transportation was furnished as a part of the contract of

employment, as such an implied finding is necessary as a basis for the finding that the injury arose out and in the course of the employment. However, as a recital of the facts indicates, it can hardly be said that there is "substantial evidence" to support this implied finding.

This is not a case where the employer loaded its truck with its employees and sent them off to the Fair for a day of recreation. Instead, the facts show that the Claimant sought recreation in this own way, at his own expense, using public transportation. Because of the courtesy of an employee of another employer, he happened to be injured. Under these circumstances, it cannot be said that the transportation had any reasonable connection with the employment and the second test is not fulfilled.

It follows that there is not substantial evidence to support the Commissioner's finding that the injury arose out of and in the course of employment. It is therefore respectfully submitted that the Commissioner's award should be vacated.

Dated, San Francisco, California,
May 16, 1952.

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